Department of Energy
Washington, DC 20585
September 30, 2002

Air and Radiation Docket and Information Center (6102)
Attention: Docket Number A-99-20
U.S. EPA
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

Dear Sir or Madam:

The U.S. Department of Energy (DOE) has reviewed the Environmental Protection Agency's notice of proposed rulemaking, "National Emission Standards for Hazardous Air Pollutants: Site Remediation," published in the July 30, 2002, *Federal Register* (67 *FR* 49397). Enclosed please find two copies of the Department's comments and recommendations on the proposed regulations based on our review of their potential impacts on DOE operations and facilities.

The Department appreciates the opportunity to comment on the proposed rule. If there are any questions concerning the enclosure, please contact Ted Koss (202 586-7964; theodore.koss@eh.doe.gov) or Emile Boulos (202-586-1306; emile.boulos@eh.doe.gov) of my staff.

Sincerely,

for Andy Lawrence
Director
Office of Environmental Policy and Guidance

2 Enclosures

cc: Greg Nizich, Emissions Standards Division, EPA (C439-03)

U.S. DEPARTMENT OF ENERGY

COMMENTS REGARDING NATIONAL EMISSION STANDARDS FOR HAZARDOUS AIR POLLUTANTS; SITE REMEDIATION; PROPOSED RULE

Notice of Proposed Rulemaking
(67 *FR* 49398-49453; July 30, 2002)

Docket Number A-99-20

1U.S. Department of Energy Comments on the Proposed Rule Concerning National Emission Standards for Hazardous Air Pollutants: Site Remediation 67 *Federal Register* 49397; July 30, 2002

General Comments

The U.S. Department of Energy (DOE) appreciates that this proposed rule addresses a complex topic. However, in order to achieve compliance without imposing unreasonable burdens, DOE believes that the rule needs to be made more user-friendly. In doing so, the U.S. Environmental Protection Agency (EPA) should give greater attention to the perspective of a person who must determine whether the rule is applicable to a facility. Two changes that DOE recommends are one or more schematics with yes and no arrows to aid comprehension and revising definitions to make them more understandable.

Even though this rule would contribute to reduced hazardous air pollutant (HAP) emissions, the technical and administrative burdens that this rule would impose could cause some affected parties to rush to remediate before the rule is final, thereby possibly compromising the design or execution of the remediation.

Specific Comments

1. Definition of Remediation Activity [§63.7881(b)]

The term "remediation activity" is a key term in the proposed rule, because it defines the activities to which the rule applies. In the proposed rule, this term is defined in a way that is circular, providing little guidance in determining whether an activity falls within the definition of "remediation activity," and hence within the scope of the proposed rule. The ambiguity of the term "remediation activity" vests too much discretion in EPA to determine the applicability of the rule, and provides little notice as to the scope of proscribed conduct.

By its terms, the proposed rule only applies to those activities that are "remediation activities" [§63.7881(b)]. "Remediation" is defined as "cleanup of remediation material" [§63.7881(c)]. The term excludes "monitoring or measuring contamination levels through wells, or by sampling" [§63.7881(c)]. "Remediation material" under the proposed rule means "material[1] . . . which is managed as a result of implementing remedial activities required under Federal, State, or local authorities, or voluntary remediation activity" (§63.7942). To link the meaningful components of the definitions together, the term "remediation activities" means "the cleanup of material which is managed as a result of implementing remedial activities," except for "monitoring or measuring contamination levels through wells, or by sampling."[2] Add to this regulatory

[1] The only indication of the scope of the word "material" is that it includes "contaminated media," and "media" is defined at §63.7942.

[2] The addition of "required under Federal, State or local authorities, or voluntary remediation" adds very little to the definition, since, generally, remediation will either be required by law, or will be voluntary.

definition the understanding that "cleanup" and "remediation" are used interchangeably (see preamble discussion at p. 49400), and the definition of "remediation activity" turns out to be largely circular (*i.e.*, the remediation (cleanup) of material which is managed as a result of implementing remedial activities.) The only degree of clarity offered is that certain monitoring and sampling activities do not constitute "remediation activity."

With respect to DOE activities, the ambiguity of the meaning of "remediation activity" raises the question of whether a number of DOE activities would fall within the meaning of the term, including, but not limited to: decontamination and decommissioning activities; the treatment of contaminants in water-effluent treatment systems; the proposed conversion of depleted uranium hexafluoride; Toxic Substances Control Act compliance for leaking polychlorinated biphenyls in former process-building gaskets; and the retrieval and processing of stored transuranic (TRU) waste.

A good starting point for drafting a definition of "remediation activity" that provides more clarity is at p. 49400 in the preamble to the proposed rule. There "remediation activity" is discussed in relation to "releases" of "hazardous substances" into the "environment (*e.g.*, soil, groundwater, or other environmental media)." These terms could be employed in a regulatory definition of "remediation activity."[3] Additionally, the definition of "remediation activity" should specify the types of activities that are covered (see section I.D of the preamble) and distinguish between routine management/treatment of industrial effluents/wastes, which would not be "remediation" (*e.g.*, treatment of industrial waste water prior to discharge at a Clean Water Act permitted outfall, or operation and closure of Resource Conservation and Recovery Act (RCRA) treatment, storage, and disposal (TSD) units) and the management of wastes from remediation of wastes or contaminated media pre-existing in the environment, which would be "remediation." A regulatory definition along the lines of those suggested above would clarify the scope of the rule and provide the regulated community with meaningful notice as to the activities covered by the rule.

2. CERCLA/RCRA Exclusion [§63.7881(e)(6,7)]

The rule excludes "remediation . . . performed under the Comprehensive Environmental Response, Compensation, and Liability Act" (CERCLA) [§63.7881(e)(6)] and "remediation activity [that] is a corrective action . . . ." [§63.7881(e)(7)]. The rationale for this exclusion in section II.A. of the preamble is logical, and DOE agrees that this exemption is appropriate. However, the exclusion requires clarification in several respects:

- The CERCLA exclusion refers to "remediation" under CERCLA. Remedial actions under CERCLA are distinct from the more short-term, and discrete cleanup actions known as "removal actions." The use of the word "remediation" in the exclusion, and the use of "remedial activities" in the definition of "remediation material," coupled with the preamble discussion relative to the exclusion (see p. 49406), which discusses the exemption in terms relevant to

[3] The terms "releases," "hazardous substances" and "environment" could be given meaning relative to their Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) definitions. See CERCLA Section 101, 42 *USC* §9601.

CERCLA remedial actions (*e.g.*, by referencing Records of Decision), raises the issue of whether "removal actions" are included within the scope of the exclusion. EPA should clarify that the proposed exclusion applies to both remedial and removal actions under CERCLA.[4] Doing so would further the EPA policy objectives for the CERCLA exclusion (see p. 49406) and avoid creating a disincentive for using a streamlined approach for implementing a CERCLA cleanup action.

- While the rule may not be applicable to CERCLA/RCRA actions, such actions may play a role if regulators deem them to be "relevant and appropriate" for CERCLA cleanup actions, thereby becoming Applicable or Relevant and Appropriate Requirements (ARARs) that are enforceable components of the remedy (a similar concept is employed by some States in corrective action decisions under RCRA). It would be helpful if EPA would clarify whether, or the extent to which, the rule would be considered a "relevant and appropriate" requirement for CERCLA/RCRA remediation decisions. Specifically, DOE urges EPA to clarify the rule, such that it would reflect the following intent: The exclusion for CERCLA/RCRA remediation activities, coupled with the preamble discussion at p. 49406 (suggesting that CERCLA/RCRA ensure protection of human health and environment, and the rule is not necessary to augment those authorities) indicate an intent that the rule would rarely, if ever, be a "relevant and appropriate" requirement under CERCLA. If EPA's intent were otherwise, DOE would be concerned that the value and effect of the exclusion would be largely eviscerated.

- The exemption from Subpart GGGGG at §63.7881(e)(7) is limited to TSD facilities and any facility as required by orders authorized under RCRA section 7003. DOE recommends that the RCRA exemption be expanded to include any corrective actions under RCRA at a former or current TSD facility, as well as any corrective actions undertaken pursuant to RCRA authority or pursuant to State authority under a RCRA delegation from EPA.

3. Facility-Wide Exemption [§63.7882(c)(1)]

EPA proposes a facility-wide exemption when the total annual quantity of HAPs contained in all extracted remediation material at the facility (including HAPs emitted from process vents) is less than 1 megagram per year [§63.7882(c)(1)]. DOE recommends that this subsection be changed to 1 megagram of material subject to the rule per year. Material included in CERCLA remediations and RCRA corrective actions should not be counted toward the 1 megagram calculation, given the exemption from Subpart GGGGG at §63.7881(e)(6,7).

4. Exception for Short-Duration Site Remediations [§63.7882(c)(6)]

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[4] The use of the CERCLA term, "response actions," could be used in lieu of "remediation," thereby clarifying that the exemption encompasses both removal and remedial actions. See CERCLA Section 101(25), 42 *USC* §9601(25).

EPA has recognized the possible disincentive to cleanup spills when doing so may trigger Subpart GGGGG, as discussed on p. 49407, and has granted an exemption under section §63.7882(c)(6) which exempts: "Cleanup of any contamination where removal or treatment of the material begins within seven days from the time that the contamination occurs. The cleanup process should be continuous (*i.e.*, performed every workday) and typically completed in 30 days or less." In general, DOE agrees with this exemption. However, there are several modifications that DOE recommends:

- DOE recommends that the 7-day period begin when the contamination is discovered rather that when it occurs.

- DOE recommends that the 7-day period be expanded to 14 days to allow for cleanup plans to be formulated. In addition, there may be circumstances in which the time frames referenced in the exception cannot or should not be achieved, and yet the exemption may still be appropriate. EPA requested comments on whether duration-based exemptions should be broadened. DOE suggests that the exemption be broadened by making it more flexible by adding the following sentence to the criteria quoted above:

  > "If this timing is not feasible but the circumstances are such that it would be appropriate to grant this exemption, justification must be provided in writing and approval from the appropriate authority must be obtained."

- The requirement that cleanup proceed "every workday" is not practical. A variety of considerations may affect whether cleanup may proceed "every workday," including the need for notice/coordination with regulators, the availability of trained personnel and funding to implement the action, or interference by inclement weather. Moreover, it may be difficult to document that cleanup is proceeding "every workday" when the cleanup is in the planning/administrative phases before actual field cleanup is initiated. DOE recommends that the parenthetical, "(*i.e.*, performed every workday)" be deleted from the rule.

In addition, DOE recommends adding language to this subsection indicating the portions of Subpart GGGGG that the source would be exempt from. For example, "You are exempt from the requirements of §§63.7890 through 63.7933 if . . . ."

5. Mixed Waste Exclusion [§63.7882(c)(7)]

The rule excludes "radioactive mixed waste managed in accordance with all applicable regulations under the Atomic Energy Act [AEA] and the Nuclear Waste Policy Act [NWPA] authorities" [§63.7882(c)(7)]. This exemption from the rule is appropriate. However, several issues arise from the phrasing of this proposed exclusion:

- The use of the term "mixed waste" is not defined and should be clarified in the rule. Presumably, EPA intended the term to have the same meaning as in RCRA – "waste that contains both hazardous waste and source, special nuclear, or by-product material subject to the Atomic Energy Act of 1954" [42 *USC* §6903(41)]. If so, it is unclear why EPA would distinguish between mixed waste containing HAPs and radioactive

waste (source, special nuclear, or by-product material waste) containing HAPs.[5] An exemption applying more broadly to radioactive waste as well as mixed waste would be preferable.

- The use of the phrasing "managed in accordance with" at §63.7882(c)(7) is problematic, suggesting that non-compliance (even if minor) with one or more regulations of the AEA or the NWPA would subject waste to the scope of this rule. DOE suggests phrasing such as "subject to applicable," as a substitute for "managed in accordance with all."

- The use of the term "regulations" is too narrow, especially for DOE activities. Many of the requirements of the AEA that apply to DOE activities are in the form of "Directives" issued under AEA authority, rather than promulgated regulations. The reference in the preamble and proposed rule to "applicable regulations" should be changed to "applicable requirements" to avoid any unintended confusion as to whether AEA activities conducted under DOE Directives are similarly exempt from this rule.

- The use of the conjunctive "and" between the "Atomic Energy Act" and "Nuclear Waste Policy Act" may create an issue of whether the exemption only applies to waste subject to both statutes (*e.g.*, high level waste). Inserting "or" in lieu of "and" would clarify this ambiguity.

- In order to ensure that the life-cycle management of TRU waste (including removal, storage, processing, disposal) falls within the scope of the exclusion, EPA should also reference the Waste Isolation Pilot Plant Land Withdrawal Act, Public Law 102-579 (in addition to the AEA and NWPA).

Comments on Miscellaneous Provisions

§63.7882(b)(3): EPA should clarify whether vents in equipment would be regulated by the process vent requirements or the equipment requirements.

§63.7882(c)(2): The use of the phrase "in compliance with" suggests that this rule would apply if there were non-compliance (even if minor) with the standards applicable under other subparts. DOE recommends replacing "in compliance with" with "subject to."

§63.7882(c)(3): Consistent with §*63.7882*(c)(4), the exemption should not include the reference to §69.7933, which applies to how long records must be kept. Since records must be kept per §63.7932(a)(4), §69.7933 should continue to apply to specify how long the records should be kept.

§63.7882(c)(7): DOE recommends inserting the following at the end of the clause: "is exempt from the requirements of §§63.7890 through 63.7933."

§63.7883(a)(2): The operation of this rule should be clarified in relation to §63.6(b)(3),

[5] If the distinguishing factor is that a mixed waste is governed by RCRA management regulations, then there should be an exclusion for RCRA waste generally, not just RCRA waste subject to corrective action as in §63.7881(e)(7).

which appears to provide an exception to the general requirement set forth in §63.7883(a)(2). DOE recommends inserting the following at the beginning of the clause: "Except as provided in §63.6(b)(3),"

§63.7901(a): The second sentence of this subsection should clarify that the obligations imposed by the subsection do not apply to persons who do not meet the general applicability standards set forth in §63.7881.[6] If EPA intends to apply these requirements to a facility which is an area source of HAPs that receives remediation material from another facility, EPA needs to address this in more detail in the final rule, to ensure that regulated entities are aware of the requirements.

§63.7901(a): The regulations should set forth a definition of the triggering event for the applicability of this subsection, namely the meaning of "manage remediation material," specifying the activities that encompass the term "manage." This term is closely related to the term "remediation activity," used in §63.7881. In clarifying the meaning of the phrase, "manage remediation material," EPA should address whether transportation and disposal activities are covered within the meaning of the phrase. (If transportation is covered, EPA should also address how the standards for containers imposed by the rule relate to U.S. Department of Transportation standards for containers used for shipment.)

§63.7912(a)(3)(i): It may be impractical to sample material in the device used to deliver material before the device enters the treatment or management unit. Sampling during staging inside a storage or treatment unit may be the only practical means of sampling material in some instances. DOE proposes deleting the phrase "prior to entering the treatment or management unit."

§63.7912(a)(4)(iv): This subsection vests EPA with the discretion to determine whether Volatile Organic Hazardous Air Pollutant (VOHAP) concentration should be assessed according to testing or "knowledge of the material." DOE recommends that EPA adopt the approach set forth in RCRA regulations allowing the generator to choose either process knowledge or sampling to determine if a waste is a hazardous waste. Vesting EPA with authority to select one method over the other in a given circumstance, without criteria for guiding such selection, raises issues of due process.

§63.7942: The definition of the term "remediation material" should be clarified. First, the term "material" is vague and needs a separate definition. Does it encompass "debris," or personal protective equipment contaminated with contaminated media? Second, the term "managed" is unclear and needs a separate definition. See comment regarding §63.7901(a), above. Third, the term "remedial activities" needs to be defined more clearly. Does the term include CERCLA removal actions? Is the term synonymous with "remediation activities?"

Table 8 to Subpart GGGGG of Part 63: EPA has provided a very convenient series of tables that describe how certain requirements are to be met. In Table 8, considerable space could be

[6] While this suggestion may sound axiomatic, requiring no clarification, it is unclear whether EPA intended the obligations of this subsection to pass to the owner/operator of a facility which would not otherwise be subject to the rule under §63.7881 (*e.g.*, because the facility is not a "major source"), if that person received waste from a facility which is subject to the rule (*e.g.*, from a facility that is a "major source"). If this were EPA's intent, EPA should address whether it has authority to extend regulations promulgated under Section 112(d) of the Clean Air Act for "major sources" to facilities that are not "major sources."

saved if the following phrase is moved into the heading: "You have met the work practice standard and as part of the Notification of Compliance Status, you submit a signed statement that."

Table 13 to Subpart GGGGG of Part 63: The brief description of subsection §63.7(b)(2) is incorrect. The description states that the notification must be made "5 days before . . . ." The cited regulation, on the other hand, contains no 5 day requirement, but instead requires notification "as soon as practicable and without delay...."